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ATTORNEYS FOR Defendant AT&T CORP.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC.,

AND

WINBACK & CONSERVE PROGRAM,  
INC., ONE STOP FINANCIAL, INC., :  
GROUP DISCOUNTS, INC., :  
800 DISCOUNTS, INC. :  
:

AND

PUBLIC SERVICE ENTERPRISES  
OF PENNSYLVANIA, INC.,

Plaintiffs,

v.

AT&T CORP.,

Defendant.

CIVIL ACTION NO.  
95-908 (NHP)

SECOND  
SUPPLEMENTAL  
CERTIFICATION OF  
CARL WILLIAMS

CARL WILLIAMS, of full age, hereby certifies as follows:

1. I am currently employed by AT&T Corp. ("AT&T") as a  
Branch Manager, Business Customer Care Center - special Markets in

the Specialized Markets Directorate ("SMD") , a position I have held since January, 1993. I have been employed by AT&T for over twenty-three years.

2. I submit this Second Supplemental Certification as part of AT&T's submission in connection with the Court's rehearing on the application for a Preliminary Injunction. The information contained in this Certification is based on a review of the records kept in the normal course of business by AT&T.

3. I understand that there are eight plans for which CCI is the customer of record and from which CCI wishes to transfer substantially all of the locations under the plans. I have attached hereto as exhibit A a chart showing for each of the eight CCI plans, among other things, the start dates, annual and monthly commitments, average monthly billing, annualized billing, and current projected shortfall. Attached as exhibit B is chart showing projected shortfall under the plans if most or all of the locations under the plans were transferred on December 1, 1995.

4. Exhibit A shows the current projected shortfall charges for each plan (if any), which is the difference in the annualized billing and annual commitment for each plan. As of November 27, 1995, the projected shortfall charges on those four plans (#s 3124, 2430, 3524, 2829) amount to approximately \$20,230,000, all of which represent potential unsecured debt to AT&T.

5. Exhibit B demonstrates the estimated shortfall for Live 6f these eight plans IC all or substantially all of the locations under the plans are transferred on December 1, 1995. This figure is the difference between the annual commitment and year to date billing (including a projection of average billing through the month of November). The result is that if there was no traffic billed under these plans after December 1, 1995, projected shortfall would increase \$13.293 million, resulting in \$33.523 million in total projected shortfall for CCI. This \$13.293 million represents one component of the additional risk to AT&T if the CCI/PSE transfer were executed without the furnishing of security.

6. A second increased risk for AT&T in the event of the CCI/PSE transfer is the likelihood that CCI would have a reduced ability to satisfy any potential shortfall obligations to AT&T because it would be transferring a significant asset (the revenue stream) to PSE. Although any reduced ability is difficult to quantify, AT&T should insist on a deposit in excess of \$13.293 million, representing the increased risk to AT&T plus the increased risk that CCI would be less able to satisfy any taxified obligations to AT&T.

I certify under penalty of perjury that the foregoing is true and correct.

  
CARL WILLIAMS

Dated: November 28, 1995

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# COMBINED COMPANIES, INC

PLAN	START	FIRST BILL	ANNUAL	MONTH	YTD	# MO.	AVG MO.	ANNUALIZE	COMMIT	ESTIMATED
ID	DATE	MONTH	COMMIT	COMMIT	BILLING	BLG	BILLING	BILLING	MET?	SHORTFALL
1351	Jul-94	Aug-94	4.800	0.400	2.250	6	0.380	4.500	NO	Not Found
2828	Jun-94	Jul-94	24.000	2.000	10.680	7	1.530	18.310	NO	No Term Plan
1583	Jun-94	Jul-94	3.000	0.250	2.630	7	0.380	4.510	YES	Not Found
3124	May-95	Jun-95	12.000	1.000	2.375	5	0.475	5.700	NO	6.300
2430	Jul-95	Aug-95	7.000	0.583	0.745	3	0.248	2.980	NO	4.020
3524	Jul-95	Aug-95	4.800	0.400	0.448	3	0.149	1.788	NO	3.010
2629	May-95	Jun-95	21.000	1.750	5.873	5	1.175	14.100	NO	6.900
3683	Mar-95	Apr-95	3.000	0.250	2.444	7	0.349	4.180	YES	0.000

AA1262

COMBINED COMPANIES, INC.  
(DOLLARS IN MILLIONS)

PLAN ID	START DATE	FIRST BILL MONTH	ANNUAL COMMIT	MONTH COMMIT	YTD BILLING	# MO. BLG	AVG MO. BILLING	ANNUALIZE BILLING	COMMIT MET?	TRANSFER DEC. 1 S/F
1351	Jul-94	Aug-94	4.800	0.400	2.250	6	0.380	4.500	NO	Not Found
2828	Jun-94	Jul-94	24.000	2.000	10.680	7	1.530	19.310	NO	No Term Plan
1583	Jun-94	Jul-94	3.000	0.250	2.630	7	0.380	4.510	YES	Not Found
3124	May-95	Jun-95	12.000	1.000	2.375	8	0.475	5.700	NO	9.150
2430	Jul-95	Aug-95	7.000	0.583	0.745	4	0.248	2.980	NO	6.007
3524	Jul-95	Aug-95	4.800	0.400	0.446	4	0.149	1.788	NO	4.206
2829	May-95	Jun-95	21.000	1.750	5.873	6	1.175	14.100	NO	13.952
3663	Mar-95	Apr-95	3.000	0.250	2.444	8	0.349	4.190	YES	0.207

AA1263



1 MR. YESKOO: Sorry.

2 CROSS-EXAMINATION

3 BY MR. YESKOO:

4 Q Were you ever asked to analyze the transaction between  
5 Winback & Conserve back to PSE?

6 A No. I wasn't.

7 Q Now, you presented certain charts on the bad debt that AT&T  
8 has incurred in the past, is that correct?

9 A Yes, I did.

10 Q Isn't it true you did not present a chart on CSTP?

11 A That is correct, I did not.

12 Q Now, on CSTP. What is the total amount of commitment to  
13 AT&T on all the CSTP II plans; do you know?

14 A I don't know the answer to that.

15 Q It would be several hundred million dollars?

16 A Most definitely in that range.

17 Q You have \$490,000 on deposit, is that correct, sir?

18 A That is correct.

19 Q So you have less than one percent of the total commitment  
20 on deposit?

21 A For the record,

22 Q Approximately one percent, is that correct?

23 A Yes.

24 Q Here you're asking for 25 percent on the CCI transaction;  
25 isn't that correct?





1 20 cents a minute, isn't that right, Mr. Williams?

2 A I wouldn't know that.

3 THE COURT: That's not his field of expertise.

4 MR. YESKOO: No further questions, your Honor. Thank  
5 you.

6 Mr. Helein will examine.

7 MR. HELEIN: I'll be brief, your Honor.

8 CROSS-EXAMINATION

9 BY MR. HELEIN:

10 Q Did you personally prepare your certification, Mr.  
11 Williams?

12 A Well, I prepared it with the help of others.

13 Q Who else did you prepare it with?

14 A My attorneys.

15 Q Anyone else in your department?

16 A Yes. I had help in putting together the charts. People  
17 who work for me. At my direction those charts were prepared.

18 Q A lot of people or just one or two?

19 A Just a couple of people.

20 Q Did you look at any records?

21 A Yes.

22 Q What records did you look at?

23 A We looked at the bad debt history records. Uncollectable  
24 expense records.

25 Q Were these bad debt and uncollectable records with respect

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1 commitments, isn't that true?

2 A Not at all.

3 Q **Could** you look at the Williams affidavit, the Williams  
4 certification that **was** filed in this action?

5 A *Yes*, I did look at it. The Williams certification  
6 **bases** their certification on the original commitments of  
7 the plan which those commitments have been ameliorated  
8 substantially **due** to time.

9 My commitments are much less now. In fact, I'm  
10 graded among the very top of the aggregators in the United  
11 States of meeting my commitment based upon AT&T's  
12 information.

13 \*Q Mr. Inga, you know, do you not, that if the service,  
14 except for the home account -- or Mr. Yeskoo called it the  
15 "lead account" -- is transferred to PSE, the shortfall and  
16 termination liabilities remain with Winback & Conserve,  
17 isn't that correct?

18 A **Are we** referring to movement of BTN's now, or the plan.

19 Q BTN is business telephone number, correct?

20 A Yes. The locations. The individual accounts. Those  
21 are the individual locations.


22 Q I'm talking about just the BTN. Not all the  
23 obligation.

24 A Would I still be liable?

25 Q Yes.



plaintiffs' efforts to carry out this plan by enforcing rights contained in filed tariffs.

 In response, plaintiffs have tried from the outset of this action to convince this Court that their tariffed shortfall and termination liabilities to AT&T are illusory, thereby hoping to persuade the Court to order AT&T to permit the two-step transfer without either requiring CCI to furnish a security **deposit** or requiring PSE to accept the plans (and all of their liabilities) in addition to the **traffic**.<sup>2</sup> Plaintiffs' own pre-litigation agreements, however, refute their arguments and justify AT&T's reliance on its tariffed rights.

Specifically, the agreement between Winback and CCI itself attempts to apportion **shortfall** and termination liability. In no less than three paragraphs of their eight paragraph agreement (Exh. D-3), Winback and CCI deal with the allocation of risk for

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<sup>2</sup>**Plaintiffs have made** this "illusory risk" contention often, both in argument and testimony:

"[n]o shortfalls exist **under** the plans and the possibility of future shortfalls is **non-existent**" (Plaintiffs' Initial Brief at 13);

"[m]oreover, AT&T totally ignores the fact that there will be no shortfall and termination liability for the Winback plans." (Second. Certification of Larry G. Shipp, ¶ 44.);

"... AT&T's expectant penalties for a shortfall and termination chargee are but a **farce**." (Second Certification of Alfonse G. Inga at 6.)

And during the hearing, Mr. Inga **said** that "there are never shortfall termination possibilities." (Transcript, p. 112, l. 21-22.)



1 both the liabilities and **the** accounts?

2 MR. HELEIN: To AT&T, **you mean?**

3 THE COURT: To **assume** the whole thing.

4 MR. HELEIN: **Yes, your Honor.** That is required  
5 by the tariffs, themselves.

6 THE COURT: They say you're splitting it.

7 MR. HELEIN: **No, we** are not, your Honor. **It is a**  
8 **fairly** complicated transaction. Under the tariffs **.. we**  
9 **have some** people who can explain that, too. **We will be**  
10 **happy** to explain it to you or you can question them or we  
11 **can.**

12 But the actual fact is through the transfer,  
13 Winback -- let's take it this way. From the transfer of  
14 Winback's plans to Combined Companies --

15 THE COURT: Wait. Let me get to page 23 of Mr.  
16 Whitmer's brief.

17 He says, "If PSE took an assignment of the plans  
18 from Winback & Conserve, thereby accepting shortfall and  
19 termination liability, AT&T would effect transfer."

20 Would you do that?

21 MR. HELEIN: We'd certainly consider it.

22 THE COURT: He said you agreed to it, Mr. Helein.

23 MR. HELEIN: **The** fact is that PSE is **already**  
24 responsible for **all** uncollectible **debts** of **the** end user;  
25 that is, by virtue of their tariff.





1 MR. WHITMER: Your Honor, what I said was we  
2 haven't done a credit check on PSE. There wouldn't be a  
3 deposit requirement because we haven't done that. We need  
4 the shortfall termination charges to be undertaken in a  
5 secure way. That's what we've done.

6 THE COURT: You didn't say "secure" here.

7 MR. WHITMER: Your Honor, we've not looked at  
8 CCI. We looked at it as a matter of security.

9 THE COURT: Let's do it this way.

10 Mr. Whitmer, could it be seriously argued if  
11 everybody gets on the paper, so to speak, and everybody  
12 assumes all the liabilities, that you would be to some  
13 extent defenseless in attempting to stop the transfers?

14 In other words, if everybody who got the  
15 agreements now with AT&T and everyone who is going to  
16 administer these agreements, these new companies,  
17 everybody signs, how could you be injured?

18 MR. WHITMER: It might require security-

19 THE COURT: Why?

20 ~~✗~~ MR. WHITMER: The reason is CCI originally was  
21 going to take the plans, your Honor. This is an important  
22 distinction. They were going to take the plans so that  
23 the shortfall and termination liability -- the shortfall  
24 and termination liability would have followed the plans to  
25 CCI. It was because CCI was financially incapable of

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1 satisfying shortfall and termination that we, AT&T,  
2 demand a security deposit of \$13 million.

3 THE COURT: What I'm saying to you is if your  
4 present situation is that you got -- let's make it much  
5 simpler, okay?

6 You got Winback & Conserve on a piece of paper,  
7 an agreement. If Winback & Conserve gives it to Public  
8 Service -- PSE, okay -- and PSE agrees to assume and pay  
9 all of the liabilities and Winback & Conserve continues to  
10 be primarily liable for whatever it is under that  
11 contract, how could you be injured by a transfer?

12 MR. WHITMER: The answer to that question, your  
13 Honor, is whether Winback & Conserve has the capability  
14 after the transfer of satisfying shortfall and  
15 termination.

16 THE COURT: No. You have no right -- you're  
17 stuck with Winback & Conserve right now.

18 MR. WHITMER: What I was saying to you --

19 THE COURT: You have no right to go back and say  
20 "I want more security."

21 MR. WHITMER: Your Honor, the transfer to -- if  
22 the liability goes to PSE, if all service goes, if the  
23 plan goes, the termination liabilities go with the plan.  
24 The shortfall terminations go with the plan, also?

25 THE COURT: That's right.



1 THE COURT: I'm not suggesting the mathematics  
2 were easy; it **would** require a calculator. The concept is  
3 easy to understand.

4 MR. BARILLARI: It is the same, as opposed to  
5 what you committed to --

6 THE COURT: Each plan has within it its own  
7 termination provision,

8 MR. BARILLARI: Yes. And shortfall.

9 THE COURT: Okay. All right.

10 MR. WHITMER: What I said earlier -- and I think  
11 Mr. Barillari now has elaborated in terms of how it is  
12 done. The tariff, however, doesn't set a specific amount.  
13 It is not as if we can say to the Court if they have a  
14 shortfall they have to pay X. We can describe -- at least  
15 the tariff describes it that way.

16 THE COURT: I would be interested in knowing --  
17 I'm going to -- you know what I'm going to do? I'm not  
18 going to grant a Temporary Restraining Order, so everybody  
19 can relax now for a moment.

20 But that is not to suggest that I am or am not  
21 going to grant a preliminary injunction at a future  
22 hearing, which will be done promptly.

23 But there are certain fundamental gaps in the  
24 information that has been presented to the Court that the  
25 Court would **like** to have to evaluate to see if it may or

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1 THE COURT: The next thing I want to know is  
2 whether or not, over the course of the last two or three  
3 years, there have been **any** transfers which have been  
4 permitted **of** aggregators of AT&T and, if so, what the  
5 circumstances are, if any?

6 MR. WHITMER: There have been literally hundreds,  
7 your Honor. Literally hundreds.

8 THE COURT: This reminds me -- see, I'm looking  
9 at this. I tried a **case** called Benun versus Rutgers  
10 University. It was an employment discrimination **case** that  
11 dealt with a **professor** at Rutgers.

12 But, in any event, what I had to do was the  
13 arduous task of determining whether or not the university  
14 had treated Dr. Benun the same **as** they had treated all the  
15 other professors in connection with moving up the scale of  
16 professorial systems. I envisaged to **some** extent some  
17 sort of measurement like that in this **case**.

18 In other words, if you're treating them the same  
19 as you've treated everyone else, I'd be interested in  
20 that. If you're seeking to extra t from them something  
21 more than what you normally would extract, I would like to  
22 have that information.

23 The only way I'm going to **get** that is by asking  
24 for the raw data.

25 MR. WHITMER: I can anticipate part of the answer

1 to the question, your Honor. I'll **say** it now because I  
2 don't want to seem to have waited to say it later.

3 **\$54** million of commitment is a **very big** number.  
4 And the tariff provides for the ability to get three  
5 months of security. My belief would be that **security**  
6 deposits will be a smaller number on a regular basis than  
7 the security that was deposited here.

8 **THE COURT:** Would this be the biggest account  
9 that you have?

10 **MR. WHITMER:** **\$54** million is one of the largest  
11 commitments.

12 **MR. BARILLARI:** Your Honor, it would certainly be  
13 **one** of the largest transfexs we've ever done.

14 **THE COURT:** That could very well be. It's  
15 possible.

16 I'm not treating it lightly. This **not** like  
17 transferring a Ford car to one person to another. We're  
18 talking about a large operation. I understand that.

19 **MR. WHITMER:** But there are literally -- my **guess**  
20 is hundreds, if not thousands, of transfers that have  
21 happened among aggregators and aggregation plans.

22 **THE COURT:** I would be interested in transfers  
23 where the aggregation is of 'a monetary value of some  
24 significance more than \$2 million.

25 **MR. BARILLARI:** I don't **know** that **we** have **very**

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1 many over \$20 million.

2 MR. WHITMER: We'll look at it.

3 THE COURT: I'll put that limit. Twenty million.

4 I'm certainly not interested if **you** transferred a  
5 \$500,000 account, annual \$500,000 account. **Because,**  
6 obviously, it seems to me the considerations are somewhat  
7 different for a \$50 million account than a \$500,000  
8 account. At least in the \$20 million **range** or in the \$10  
9 million range. If you **can give** me ten and up, I'd  
10 appreciate it.

11 MR. BARILLARI: But, **your** Honor, the same  
12 requirements would apply **far** a 500,000 as a 50 million --

13 MR. WHITMER: In terms of tariff.

14 MR. BARILLARI: Three months.

15 THE COURT: I understand that. You may have  
16 waived in all the cases. I don't know what **you have** done,  
17 Mr. B. I don't know what you **have** done down there.

18 I'm **faced** with a situation where they're saying  
19 they're being treated unfairly. In order for me to  
20 resolve the case in fairness, **I've** got to know the facts.

21 I'd also like **to know** what -- this is perhaps a  
22 joint question. **There** has been reference to the **primary**.  
23 proceeding before the FCC.

24 MR. WHITMER: 180 days.

25 THE COURT: What is the status of that?



1 Winback and conserve when they got all these credits from  
2 AT&T?

3 \*MR. WHITMER: First of all, your Honor, Winback &  
4 Conserve voluntarily subscribed to all of these plans and  
5 took on the obligations and received promotional credits  
6 from AT&T to do that. When it did that, Winback &  
7 Conserve had existing traffic -- not as Winback &  
8 Conserve, but Mr. Inga **had** other traffic which he **was** able  
9 to transfer over to these **new** plans.

10 ~~He started some of those plans not from, shall we~~  
11 say, ground zero, but was **able** to move traffic that he had  
12 on other plans with AT&T.

13 THE COURT: What other plans did Winback &  
14 Conserve have that you ever requested a security deposit?

15 MR. WHITMER: The answer to that question is when  
16 Winback & Conserve took these plans, we had a proven  
17 history from Mr. Inga's companies. When Winback &  
18 Conserve started --

19 THE COURT: I'll get back to the genesis.

20 MR. WHITMER: Perhaps. Perhaps we should have  
21 asked for a security deposit, your Honor. Perhaps we have  
22 that right.

23 I'm tired of having laughter in the background,  
24 your Honor.

25 THE COURT: Gentlemen --



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1 the security deposit that we demanded under 2.5.8  
2 addresses.

3 THE COURT: No. It does not. It says it takes  
4 three months of services.

5 You **take** the annual billing, divide it by four  
6 and *you* say that is it. The difference between the two  
7 tariffs, multiplied out, can't be three months of service.  
8 May be more or less.

9 MR. WHITMER: It may be more.

10 THE COURT: I don't know.

11 MR. WHITHER: That is the point. If not  
12 precisely the same, at least in concept it is the same.

13 Because what the tariff does, in terms of having  
14 ~,.-.-.-.-~-----~ ~ ~ ~ ~  
15 deposit, is saying if someone is going to take on an  
16 obligation and we are insecure **as** to that party's ability  
17 to carry it out, we have the right to demand security.  
18 Instead of having some archaic calculation that is  
19 dependent upon each particular circumstance, we have  
20 defined our maximum tariff rights for deposit at three  
21 months.

22 The problem -- we got two problems here, your  
23 Honor. One of the problems is --

24 THE COURT: That number does not relate to the  
25 difference between the two rates. It relates to the  
payment for service, which is a different damage measure.



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1 we're talking about, is what PSE has. PSE got that at  
2 some point.

3 THE COURT: If PSE gets more customers, it still  
4 retains that tariff, doesn't it?

5 MR. WHITMER: It can put new service on the  
6 tariff.

7 THE COURT: It could put 100 zillion dollars on  
8 it.

9 MR. WHITMER: From your lips to God's ears.

10 THE COURT: It could.

11 MR. WHITMER: Yes, sir.

12 THE COURT: Then I get back to the simple  
13 question. The same question as the hypothetical.

14 Why can't it accept a transfer of \$54 million  
15 worth of customers if -- if they unequivocally fill out  
16 the papers which are A and B under 2.1.8? Why can't they  
17 do that? Are they bound to go out and find new customers?  
18 Can't they **grab** customers that other people have and put  
19 them in their system?

20 MR. WHITMER: Can I answer the questions in the  
21 order you've given me?

22 THE COURT: Sure.

23 MR. WHITMER: Let's assume for a moment that  
24 Contract **Tariff** 516 is what PSE has. There **was** a 90-day  
25 window from the effective date.

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1 separate the two.

2 \* MR. YESKOO: No. We don't. Our goal here is to  
3 reunite them and CCI with a contract tariff with AT&T.

4 THE COURT: That got to be by negotiation and *not*  
5 by --

6 *Mi.* YESKOO: It will be by litigation.  
7 Negotiations have been fruitless. The **only way** one got a  
8 contract **as** a reseller is by litigation.

9 THE COURT: How do you do it through litigation?

10 MR. YESKOO: Two ways.

11 Number one is go to the FCC. The FCC will block  
12 their latest filing, tariff filing, and jawbone them into  
13 giving you some.

14 The other way is suing them. **People** have gotten  
15 them both ways. It has never been achieved -- when I say  
16 a good -- a commercial commercial tariff has **never** been  
17 achieved through negotiation.

18 For a reseller --

19 THE COURT: Mr. Whitmer, you laughed very well  
20 with your eyes.

21 MR. WHITMER: Your Honor, the point is a simple  
22 one.

23 All obligations go or they don't go. They didn't  
24 go.

25 THE COURT: I understand. I **fully** understand

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1 of the service to PSE, isn't that correct?

2 A No.

3 Q Not at all?

4 A That's not what I knew at the time that I accepted the  
5 assignment of the Winback plans.

6 \*Q At the time **you** accepted the assignment of the Winback  
7 plans, you expected to hold onto all the service and use  
8 that service to try to satisfy the commitments. Isn't  
9 that right?

10 A Yes. **And** to negotiate a contract tariff with AT&T  
11 with the other companies.

12 Q **You** recognized when you accepted the plans and the  
13 concomitant responsibility for shortfall termination you  
14 were going to use the service on those plans to satisfy  
15 the shortfall termination charges, if any, correct?

16 A I recognized I had a tariff obligation under those  
17 plans. Yes.

18 Q Ultimately, Mr. Shipp, you were advised, were **you** not,  
19 that **AT&T** required a \$13.5 million security deposit from  
20 CCI?

21 A Long after I had gotten approval of the plans. That's  
22 correct.

23 Q Mr. Shipp, **you** didn't receive approval of the **plans**  
24 from AT&T, did you?

25 A Yes, sir. I did.



1       A   No.  It was after some frustration and not making any  
2       headway or progress with AT&T relative to a direct deal  
3       that we had proposed in **good** faith that we **made** that  
4       decision.  I so notified AT&T.

5       Q   **You** couldn't reach an agreement for a contract tariff  
6       with AT&T, isn't that correct?

7       A   I think that's certainly true.

8       Q   As a result of your inability to reach a contract  
9       tariff with AT&T, that is when you devised the transaction  
10      to **send** only part of the service of the Winback plans to  
11      AT&T, isn't that correct?

12      A   No, six.

13      Q   When did you do that?

14      A   I did it as a **mechanism** to prolong the life of the  
15      **plans** for the absolute desire for a working relationship  
16      with AT&T.  And recognizing that we had a responsibility  
17      and a commitment under the tariff, we structured our  
18      arrangement with PSE so that we could move the traffic  
19      back, when appropriate to meet the commitments.

20      Q   You understood, did *you* not -- at **least** you thought  
21      you understood -- if you transferred only the service but  
22      not the plans, PSE would not have any liability for  
23      shortfall termination?  Correct?

24      A   With respect to --

25      Q   Plans.



1 A -- the plans.

2 Q Yes.

3 A That's correct.

4 Q You knew there **was**, nevertheless, shortfall and  
5 termination charges that would potentially attach to those  
6 **plans**, correct?

7 A No, sir. I did not.

8 Q You knew there was a potential for shortfall and  
9 termination, didn't you?

10 A **Yes**. But **not** because of anything that we did or  
11 didn't do with respect to the transfer.

12 Q Those plans carried **with** them **a** potential of shortfall  
13 and termination, correct?

14 A **Yes**. As does **every** plan.

15 Q **As** does every plan?

16 A Yes.

17 Q **And** you knew in the arrangement that you made with  
18 PSE, PSE was going to take the service and not the  
19 shortfall and termination charges, correct?

20 A They were going to take the service at my request with  
21 my ability to move it back. Yes.

22 THE COURT: Marketing it?

23 THE WITNESS: Yes.

24 Q During the time that you did that, **sir**, the shortfall  
25 and termination charges -- withdrawn -- the liability for



1        shortfall and termination under the plans would stay with  
2        Winback & Conserve, is that correct?

3        A    No, sir. It would stay with CCI. Under joint and  
4        several liability with Winback & Conserve.

5        Q    CCI has no assets, correct?

6        A    No. I think we have a lot of assets. We own two  
7        companies.

8        Q    CCI doesn't own the companies, does it?

9        A    Well, in a technical sense, that's correct. But the  
10       same shareholder owns all three companies.

11       Q    In a technical sense, Mr. Shipp, it was the service  
12       usage on the plans that satisfies the revenue commitments  
13       that a reseller makes, is it not?

14       A    No.

15       Q    It's not the service that is used on a plan that  
16       satisfies the revenue?

17       A    It is on plans from June 17 going forward. It is  
18       certainly that. For plans pre-June 17 it is time and not  
19       revenue that satisfies the commitments under the plan.

20       Q    But, also there is a revenue commitment or all eight  
21       of the plans that you sought to have transferred to CCI,  
22       is there not?

23       A    Yes, sir.

24       Q    And that revenue commitment for those plans is  
25       satisfied by the service usage that is logged on those

1 plans, correct?

2 A It is satisfied by time. Not by the service usage  
3 associated with those plans.

4 Q The time **means** the **usage** on the network, the phone  
5 calls that are made, the charges that are incurred as a  
6 result, correct?

7 A No, **sir**. Not under the **way** the tariff **was** written.

8 Q You knew, did **you** not, ~~however~~, there were dollar  
9 commitments that had to be **made**, correct?

10 A I knew that there were dollar commitments that had to  
11 be retired under the tariff. Yes, sir.

12 Q When you say "retired under the tariff," you mean that:  
13 you knew there was a possibility of retiring those  
14 commitments by making even greater commitments, is that  
15 correct?

16 A That was one of the ways.

17 Q What ~~is~~ another way?

18 A Another way is to discontinue the plan without  
19 liability into another contract tariff.

20 Q That is --

21 A Which is what I had tried to do.

22 Q Forgive me for interrupting you, Mr. Shipp.

23 That was -- one of the other **ways was** by folding  
24 it into another commitment, is that correct?

25 A Yes.

1 Q The contract tariff?

2 A Yes. It **doesn't have** to be -- Mr. Whitmer, just for  
3 one second. It doesn't have to be another plan, CSTEP  
4 plan. It can be any other plan.

5 So there were numerous **opportunities** on the  
6 market today for that kind of a transaction.

7 Q The question is: In order to **discuss** without  
8 liability, Mr. **Shipp, you knew** you had **to** be able to move  
9 those plans into another plan, either CSTEP plan or **some**  
10 other contract tariff or some other service plan which **had**  
11 a greater commitment?

12 A Yes.

13 THE COURT: Get a better deal?

14 THE WITNESS: Yes.

15 THE COURT: GBD?

16 THE WITNESS: Yes.

17 THE COURT: I understand this.

18 Q And you knew that in order -- follow what I'm saying,  
19 please, Mr. Shipp.

20 In terms of satisfying the revenue **commitments** on  
21 the plan -- forget **about** discontinuation without  
22 liability. In order to satisfy the revenue commitments of  
23 the **plan**, the plan looks to the service usage that is  
24 generated under the plan, isn't that right?

25 A That **is** one way.



1 there which I couldn't meet. There were location caps on  
2 it. I couldn't obtain it.

3 516 doesn't have a location cap on it. **That** one  
4 would be available for me.

5 Q What do you mean by "location cap"?

6 A AT&T does -- what they do with all their contract  
7 tariffs except for the mistake they **made** on 516 was they  
8 put a **cap** on the amount of locations that could be entered  
9 on to a contract tariff. This way, no aggregator can pick  
10 it up for resale.

11 Q Why can't an aggregator **pick it up** for resale?

12 A Obviously, at this point we would have maybe 15,000  
13 accounts. If the contract **says you** can't have more than  
14 50 locations on a plan, obviously, you can't take -- the  
15 only way to do that would be 400 different corporations.

16 THE COURT: That's not beyond the pale of  
17 imagination, is it?

18 MR. MEANOR: It will keep the Secretary of State  
19 happy, anyway.

20 You have been here during the course of this  
21 hearing and **you have** heard and participated in the  
22 transfer of customers, end users, for service through PSE.  
23 You're familiar with that. Correct?

24 A Yes.

25 Q Have you on prior occasions transferred some but not

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1 all of one of your plan's customers to another plan?

2 **A** Yes One Stop Financial **was** obviously the first company  
3 I started. I had all my accounts on one corporation.

4 When Mr. Fitzpatrick told me to take on more  
5 corporations to obtain more promotions **and** make more of a  
6 commitment to AT&T, when we **were** just going into that  
7 portability environment, I transferred all of the -- used  
8 the transfer and service agreement **form** to transfer  
9 accounts from **One** Stop Financial to distinctly separate  
10 corporations which I did not guarantee any of the  
11 liabilities. Winback & Conserve, 800 Discounts and Group  
12 Discounts. The Transfer of Service Agreement form **was**  
13 used to move those locations. The plan **was** not moved.  
14 Just the locations.

15 **Q** Is that the same TSA or transfer of service form that  
16 was **used** to transfer some but not all of the **Winback** end  
17 users for service through **PSE**?

18 **A** That form in six years has never changed. That **is** the  
19 form that is used for transfer **of** plans and transfer of  
20 accounts for name changes, corporation changes, et cetera.

21 **Q** Was it the same form, identical form, that **was** used **to**  
22 attempt to transfer some of the Winback accounts but **not**  
23 all of them for service through **PSE**? **Was** it the same  
24 form?

25 **A** The same form.

3 Q When you used that TSA form, Transfer of Service  
2 Agreement, on prior occasions to transfer end users for  
3 service through one of your companies to another, were you  
4 ever asked to put up a deposit, security deposit?

5 A No. Not only did I do it to my own corporations, but  
6 I had transferred hundreds and hundreds of accounts to  
7 other **aggregators'** plans and never **was** there a **security**  
8 **deposit**.

9 Q Tell us about that.

10 A Linvan and Ameratel 800. I transferred **approximately**  
11 200 accounts to his plan, **which** was called Ameratel 800 at  
12 that point.

13 That **was** -- he did not take up a **security deposit**  
14 **at all**.

15 THE COURT: What were the **value** of the services  
16 for **a** year on those 200 accounts?

17 THE WITNESS: Maybe each location was \$250.  
18 Maybe 40 or 50,000 in traffic.

19 THE COURT: Forty or 50,000. It's riot **54**  
20 million.

21 THE WITNESS: Neither was the transfer of One  
22 **Stop** over to Winback.

23 THE COURT: I understand. Go ahead.

24 Q Yes?

25 A They were in shortfall.

1 Q When you say "transfer an account," you mean transfer  
2 customers, end users?

3 A Two transfers. One is of the account and the other of  
4 the plan.

5 Q Linvan was what?

6 A They were a manager of a company called Ameratel 800.

7 Q Did you transfer any accounts from one of your  
8 companies to any other company than Mr. Linvan's company  
9 if you know, if you can recall? If you don't remember,  
10 you don't remember.

11 A I don't remember.

12 Q When did the transfer of 200 or so accounts to Mr.  
13 Linvan's company take place?

14 A The end of '93, I believe.

15 Q Did AT&T make any objection to the transfer of those  
16 accounts?

17 A Not at all.

18 Q Were they accepted by AT&T?

19 A Yes. I also transferred accounts between my  
20 corporations all the time.

21 Q No deposits?

22 A Never.

23 Q No objection?

24 A No.

25 MR. MEANOR: Thank you.



1 THE COURT: Did you transfer all obligations,  
2 both **the** plan and the --

3 **E** WITNESS: No.

4 THE COURT: -- and the service?

5 Q Just the accounts get transferred?

6 A Every day they do this at AT&T, accounts are moved  
7 every **day**. In fact, in **the** tariff **AT&T** put a provision in  
8 there when you transfer an account from one CSTP II to  
9 another CSTP II, **AT&T charges** \$50 to move that.

10 Because there are so many thousands of accounts  
11 being **moved**, **AT&T** said: Wait a minute. Put a \$50  
12 location charge on this move. That was done back in the  
13 middle of -- maybe at the beginning of 1993. In that  
14 area. Location charge because of the tremendous amount of  
15 moves.

16 We had a letter from AT&T saying that from now on  
17 you're going to be charged \$50 **every** time you move an  
18 account.

19 Q Have you been paying it?

20 A Of course.

21 Q What would be the effect with respect to that charge  
22 on the movement of these companies to PSE?

23 A This is different because this is a movement of  
24 accounts from a CSTP II into a contract tariff. Under FCC  
25 No. 2 Tariff, what happens when you move an account from a



1 A That's right.

2 Q You've been **paid** promotional credits in the **form** of  
3 air line tickets; isn't that correct?

4 A Yes.

5 Q Is it fair to say many thousands of dollars in airline  
6 tickets in promotional credits have been given to the'  
7 corporations who **own** those **plans**?

8 A I **have** not **made** a list of the dollars **that** have been  
9 accumulating on airline tickets, That is a very nothing  
10 part of our business. 516 offers million dollars in promo  
11 money, also.

12 So far as the **passes**, what the CSTP would be, the  
13 point is moot.

14 Q **Whether** it is moot or not, Mr. Inga, the fact is you  
15 have received promotional credits all along in holding the  
16 CSTP plans?

17 A If I **was** given 516, I would **have** --

18 **THE COURT:** Mr. Inga, we'll be here to midnight.  
19 Listen to his question. How ever stupid you may think the  
20 question is, answer it. Don't make a speech.

21 A Okay.

22 Q You've been paid promotional credits on the CSTP **XI**  
23 **plans**, correct?

24 A My companies have been, yes.

25 Q In point of fact when you started these companies, you

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1       moved traffic from One Stop Financial on to those plans;  
2       isn't that correct?

3       A    You Used a Transfer of Service Agreement to move  
4       account locations. Not **plans**.

5       Q    You created those CSTP II plans, created the companies  
6       to take the service under those CSTP If plans in part for  
7       the opportunity to gain those promotional credits, is that  
8       correct?

9       A    Mr. Fitzpatrick directed my to do **that**. Yes.

10      Q    Mr. Fitzpatrick directed you to do it, **but** you, in  
11      fact, did it; isn't that correct?

12      A    Because they wouldn't give me a contract tariff.

13      Q    Mr. Inga, you were told, by Mr. Fitzpatrick that if you  
14      formed companies, you could get a CSTP II plan at  
15      promotional credits, correct?

16      A    If I formed four companies, I could have taken out  
17      four 4516 tariffs because it was **only** for 20 million a  
18      year.

19      Q    Mr. Inga, my question is a simple one. **Please try** to  
20      listen to my question.

21                You formed the CSTP II plans for the purpose of  
22      getting the promotional credits on the CSTP II plans,  
23      correct?

24      A    No. I formed them to obtain the promotional moneys.  
25      Is that what I really wanted to do? That was my only

1 alternative to maximize the corporate income.

2 Q You tried to -- you, in fact, formed 20 companies, did  
3 you not, Mr. Inga?

4 A Yes. Because I had the volume to make the commitments  
5 on all 20. It was approved on all 20.

6 Q You had the volume in One Stop Financial that you  
7 wanted to **break** up to put into 20 separate CSTP II plans  
8 to get those promotions?

9 A Janice Bina approved me for all 20 corporations.

10 Q You were ultimately told you could only have four?

11 A AT&T violated the tariff and only based me on four.

12 Q You received those four promotional credits. Isn't  
13 that right, Mr. Inga?

14 A Some probably had not been paid. No.

15 Q Mr. Inga, you **know how** to **go** about ordering service  
16 from AT&T, do you not?

17 A I can order CCI -- so far as the contract tariffs are  
18 concerned, AT&T has sent me a log about three inches thick  
19 on how to order a contract **tariff**.

20 It just **makes** no **sense** at all. They want me to  
21 disclose all **the** corporations that I'm bringing into **the**  
22 contract. They want me to give them my entire business  
23 plan. They want a whole slew of information about what  
24 I'm **planning** to do **and** then they're **going** to tell me:  
25 You're going to get rejected.

1 Q Mr. Inga, you knew how to order a contract tariff in  
2 the fall of 1993, correct?

3 A No, I didn't. I never did one before. May of '93 the  
4 contract tariffs came out. I had never ordered a contract  
5 before.

6 Q Did you ask --

7 A I relied on my account manager. He said, "Don't even  
8 apply."

9 Q Mr. Inga, do you consider yourself a shy person that  
10 takes direction from others?

11 A I consider myself not shy, but knowledgeable in  
12 contract tariffs definitely.

13 I relied on my account manager. He told me I  
14 could form different corporations prior to obtaining more  
15 promo moneys. I figured at this point he was telling me  
16 the truth. I just didn't apply for 516 even though it was  
17 open.

18 Q The bottom line is that you didn't apply for 516  
19 during the open period. Correct?

20 A Bottom line he told me: Don't do it because you're  
21 not getting it even if you apply.

22 Q Mr. Inga, do you also take no for an answer from AT&T?

23 A AT&T does whatever they want to do, Mr. Whitmer.  
24 Sometimes, unfortunately, you can't fight City Hall.  
25 Unfortunately, it is just the way AT&T does things.

1           It was **very** well known throughout the industry  
2           that Inga is not getting a contract.

3           Even Mr. Fitzpatrick said that to Mr. Gary  
4           Carpenter. He said -- it was well known. "Inga is not  
5           getting a contract." It was a **joke**.

6           Q   Mr. Inga --

7           A   I made offers that were **five** or six points above what  
8           I was getting, **50** points **less** than other contracts **out**  
9           there, **and** AT&T still **did** not offer me something. I was  
10          willing to give ten times the commitment and take half or  
11          one third of the revenue they were giving to other  
12          customers and AT&T still said "No, you're not getting a  
13          contract."

14          Q   Mx. Inga --

15          A   It was fruitless.

16                Go ahead. I'm sorry.

17          Q   Are you finished with your last Answer?

18          A   Yes I'm done with my last answer.

19          Q   Mr. Inga --

20                THE COURT: I don't classify that as an answer.

21                MR. WHITMER: Your Honor, it is late and I  
22                misspoke.

23          Q   Mr. Inga, at the time that you made the arrangement  
24          with Mr. Shipp to transfer the plans to CCI, you knew that  
25          some of **your** plans were not meeting the revenue

1 commitments, isn't that true?

2 A Not at all.

3 Q Could you look at the Williams affidavit, the Williams  
4 certification that was filed in this action?

5 A Yes, I did look at it. The Williams certification  
6 bases their certification on the original commitments of  
7 the plan which those commitments have been ameliorated  
8 substantially due to time.

9 My commitments are much less now. In fact, I'm  
10 graded among the very top of the aggregators in the United  
11 States of meeting my commitment based upon AT&T's  
12 information.

13 Q Mr. Inga, you know, do you not, that if the service,  
14 except for the home account -- or Mr. Yeskoo called it the  
15 "lead account" -- is transferred to PSE, the shortfall and  
16 termination liabilities remain with Winback & Conserve,  
17 isn't that correct?

18 A Are we referring to movement of BTN's now, or the plan.

19 Q BTN is business telephone number, correct?

20 A Yes, The locations. The individual accounts. Those  
21 are the individual locations.

22 Q I'm talking about just the BTN. Not all the  
23 obligation.

24 A would I still be liable?

25 Q Yes.



1       A    I would still be liable for shortfall and termination,  
2       yes, if there **was** one.

3       Q    Once Winback & Conserve has sent **all** this traffic  
4       away, Winback & Conserve does not have the capability of  
5       the remaining traffic on those plans to satisfy the  
6       commitments for revenue. Correct?

7       A    That is where you're misleading the Court, Mr.  
8       Whitmer.

9                You seem to believe that volume requires  
10       commitment. It is not the ~~case~~. Time retires **commitment**.

11               When you were referring to your better, **best**,  
12       biggest deal before, it is totally off base.

13               Mr. Whitmer, when you have a commitment -- I have  
14       the actual example in **my** certification. I **have** an actual  
15       example. I have **a** \$24 million three-year commitment. **\$72**  
16       million over three years.

17               After ten months in that commitment, Mr. Whitmer,  
18       ten months times \$2 million a month, \$20 million of the  
19       commitment is gone no matter whether I have one account on  
20       the plan or 100 million.

21               At that point, if I so choose to take the  
22       remaining commitment and subscribe to a CSTP II of **equal**  
23       or greater commitment, my overall commitment to AT&T is **no**  
24       longer 72 million. It is 62 million -- or, excuse me --  
25       \$52 million a year. **And** this is where you're misleading



1       **A**   No.  Because the Transfer of Service Agreement says  
2       that the former customer is still jointly and severally  
3       liable for the remaining commitment, even the unexpired  
4       portion, the unexpired portion of the minimum applicable  
5       term period.

6               In fact, **you** in **your** letter to **me** or to Mr.  
7       Helein on December 22nd, 1993 **states** exactly that point.

8       **Q**   Mr. Inga  --

9       **BY THE COURT:**

10      **Q**   Do you understand --

11               THE COURT:  Let me try.

12               MR. WHITMER:  Thank you, **your** Honor.

13      **BY THE COURT:**

14      **Q**   When you were going to make the transfer to CCI, did  
15      you understand that CCI was going to assume that  
16      obligation and that **you** were going to remain jointly and  
17      **severally** liable for it?

18      **A**   We would both be liable, **yes**.

19               THE COURT:  Very good.  We'll take a short  
20      **recess.**

21               **(Recess.)**

22

23

24

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1 MR. HELEIN: Your Honor, before you continue,  
2 would you **be** ruling at the end of his cross-examination on  
3 Mr. Fitzpatrick? Because I would like to have him here.  
4 I think it is **very** important.

5 **THE COURT:** Is Mr. Fitzpatrick here?

6 MR. WHITMER: He is not here, **sir**.

7 **THE COURT:** Could you possibly bring him? Is  
8 that an inconvenience, to bring him?

9 I'm not suggesting I'll order him to **be**  
10 testifying.

11 Could you bring him? Is he far **away**?

12 MR. WHITMER: He lives just outside of  
13 Philadelphia. South of Philadelphia.

14 **THE COURT:** I'll hear argument on whether  
15 Fitzpatrick should be produced.

16 In fact, Mr. Inga, get off the stand now.

17 Let's finish this argument, here. If **we** have  
18 time we will finish Mr. Inga. Let's just get this issue  
19 out of the way.

20 We're talking about Fitzpatrick. Is that right,  
21 Mr. Helein.

22 MR. HELEIN: Yes, your Honor.

23 The issue, I think that **we** originally addressed  
24 was that Mr. Inga had requested \$16 **and** Mr. Fitzpatrick  
25 had told him there was no **way** he **was** going to get it.



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Inga - redirect

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1 back?

2 THE WITNESS: Yes.

3 THE COURT: PSE, I guess, was -- when I say  
4 "doing you a favor," it was extending you a courtesy for a  
'5 price?

6 THE WITNESS: They were making an override, yes,  
7 substantially.

8 THE COURT: I understand that completely. I  
9 really do. I understand the factual pattern.

10 I have a great deal of difficulty **applying** the  
11 law to that factual pattern. But I understand the factual  
12 pattern. Belief me.

13 THE WITNESS: We were transferring the accounts  
14 to PSE.

15 THE COURT: You **said** it already.

16 **Next** question.

17 THE WITNESS: Yes.

18 BY MR. COVEN:

19 Q Assuming there **would be** a shortfall penalty -- and I  
20 know we've gone **through** many **ways** to avoid shortfall -- in  
21 your contract **with** the traffic **being** at PSE, **was** CCI  
22 permitted under that contract to retrieve that traffic to  
23 satisfy any revenue obligations that CCI and/or Winback  
24 had?

25 A Yes.

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1 MR. WHITMER: Your Honor, I object.

2 First of all, I'm **not** sure this is proper  
3 redirect. I **didn't** want to **say** that earlier.

4 THE COURT: That's **all** right.

5 MR. WHITMER: I object to talking about what an  
6 agreement is when there is a written document that **is** the  
7 best evidence.

8 THE COURT: Is there **an** agreement -- this is the  
9 question which has not been **asked**.

10 Is there a written agreement between CCI **and** PSE  
11 concerning that relationship and the retrieval of the  
12 accounts? Who has that agreement?

13 THE WITNESS: Thirty days' notice.

14 MR. SHIPP: I have it.

15 THE COURT: Is that part of the **stuff** that **is** in  
16 the hotel?

17 MR. SHIPP: **No, sir.** That **happens** to be **here**.

18 THE COURT: **Would** you give us the copy of that,  
19 please, now?

20 MR. SHIPP: **Yes, sir.**

21 THE COURT: We'll mark that.

22 I realize this is a little disjointed, **but** I  
23 think it is good to get it out.

24 MR. COVEN: Your **Honor**, for clarification  
25 purposes, what I'm trying to establish to the Court's



1       **satisfaction** is what the liabilities would be with the  
2       transfers and also **understanding why --**

3               **THE COURT:** The contract should speak for itself.

4               **MR. COVEN:** The contract was set up the **way** it  
5       was.

6               **THE COURT:** The contract **should** cover that,  
7       **shouldn't** it, Mr. Coven?

8               **MR. COVEN:** It would cover how the transfers  
9       would be effectuated, but it wouldn't necessarily **explain**  
10      to your Honor the business reasons by why it **was**  
11      **structured** in the **way** it **was** structured.

12              **THE COURT:** The contract speaks for itself. If  
13      you want to explain it, fine.

14              **THE COURT:** What do you want to number this?  
15      Plaintiffs' 1?

16              **MR. HELEIN:** P-1.

27              **THE COURT:** P-1. The contract.

18              (Exhibit P-1 marked for identification.)

19              **THE COURT:** Ask another question in the meantime.

20              **MR. YESKOO:** I have it here, your Honor.

21              **MR. MEANOR:** We found two at the same time.

22              **THE COURT:** Good. Mark one P-1. Mrs. Trivino is  
23      the official **marker**.

24              **MR. YESKOO:** Could we substitute a copy for the  
25      original?

1 THE COURT: Keep the original for future  
2 litigation and substitute a copy.

3 THE CLERK: The contract is P-1.

4 THE COURT: I can see it is signed. It **is** fox  
5 **future** litigation.

6 THE COURT: There it is. Next question.

7 MR. COVEN: It is in evidence? It has been  
8 admitted in evidence?

9 THE COURT: **Yes.**

10 (Exhibit P-1 marked in evidence.)

11 THE COURT: **Any** objection?

12 MR. WHITMER: I assume Mr. Shipp **would** testify  
13 this is the agreement **because this** is not an agreement to  
14 which Mr. Inga is a party.

15 THE COURT: Yes. Mr. Shipp will be back  
16 tomorrow.

17 MR. WHITMER: Subject to, your Honor --

18 THE COURT: Subject to connection.

19 MR. COVEN: Mr. Shipp can do that Thursday.

20 (Pause.)

21 THE COURT: Go ahead, Mr. Coven.

22 BY MR. COVEN:

23 Q Why were the **plans** transferred to CCI **and the** traffic  
24 to **PSE**? Why not transfer all; both the plans and the  
25 traffic to PSE?

I                   THE COURT: Because he transferred it to PSE  
2                   totally. It would merge into PSE and they **could** never  
3                   merge it back.

4                   I don't mean to shortcut it, but I know the  
5                   answer.

6                   Next question.

7                   Q   Why ~~were~~ you concerned about retrieving that traffic  
a                   at some point?

9                   THE COURT: Because he wanted to make a profit on  
10                  it. We wanted to run his own company.

11                  A   We wanted our own company.

12                  THE COURT: We hold these truths to be  
13                  self-evident. **You** have a judge that listens.

14                  Next question.

15                  MR. COVEN: Thank you, your Honor.

16                  Q   When **you** took out new plans under Winback or 800  
17                  Discounts or any of your other companies, were **you** ever  
18                  required **to** give a security deposit?

19                  A   No.

20                  THE COURT: Can I ask you a question?

21                  When you first started in business, were you **ever**  
22                  required to give a security deposit?

23                  THE WITNESS: Never.

24                  THE COURT: Under the name Inga individually, or  
25                  any corporate entity that **you** created?

1 THE WITNESS: I never personally guaranteed any  
2 corporation and none of **the** corporations were ever asked  
3 for a security deposits.

4 THE COURT: Including up to the present  
5 commitments of some --

6 THE WITNESS: Including yesterday.

7 THE COURT: Now much **did** you ultimately end up  
8 with as being your total commitment or total contract,  
9 approximately?

10 THE WITNESS: Right now, **if** I recast these  
11 commitments -- in my affidavit, I believe I said I was  
12 down to \$40 million, I believe, over, per year.

13 THE COURT: How much traffic **do** you actually **give**  
14 AT&T through all of your corporate facilities a year,  
15 approximately?

16 THE WITNESS: Approximately **40** million.

17 THE COURT: Next question.

18 BY MR. COVEN:

19 Q We've gone through how time requires commitment, **not**  
20 volume.

21 In the tenth or eleventh month of the plan that  
22 **was**, let's say, \$1 million for the year -- we'll assume  
23 that.

24 A Make it **600**.

25 Q **600,000?**

1 A 50,000 a month is easier.

2 Q Would it be possible in the tenth or eleventh month if  
3 there would be shortfall penalties to be **assessed** to bring  
4 back traffic, let's say, from PSE to CCI in one month to  
'5 cover that **shortfall**?

6 A As long as the commitment is made in the twelfth  
7 month, you **can** bring all the traffic in the twelfth month  
8 to satisfy it,

9 Q You don't have to do it pro rata on a monthly basis?

10 A **No.**

11 THE COURT: But you can do it that way if you  
12 want to?

13 A You can do the whole thing in the first month.

14 Q Even if you **did** the whole thing in the first month,  
15 you **would** still have a commitment, however, though, for  
16 the balance of the year?

17 A That's right. Because time retires the commitment.  
18 You still have to keep the contracts.

19 THE COURT: What about **termination**?

20 THE WITNESS: Termination is **also** assessed on  
21 year end, your Honor. The same thing. Both termination  
22 and shortfall. **Termination** is 35 percent of the contract.  
23 It is continuing. Shortfall. If you do 600 and commit to  
24 500, it is 100.

25 THE COURT: **If you** do 35 percent less than what

1        **you** committed to?

2                **THE WITNESS:** Thirty-five percent is the  
3        discontinuation.. If you discontinue the contract, the  
4        termination penalty is 35 percent of the amount committed.  
5        That is the penalty. Thirty-five percent of the amount  
6        committed.

7                **Shortfall is** simple. If you commit 600 and do  
8        500, you're short one.

9        **Q** How much shortfall and/or discontinuation penalties  
10       has your company ever paid?

11       **A** I've never --

12       **Q** Has your company, near the end of the commitment, been  
13       in a situation where it has not satisfied the revenue on a  
14       plan?

15       **A** I don't believe I have ever **gone** into a situation  
16       where -- I have restructured numerous times. I don't know  
17       if it was because of not forecasting meeting my  
18       commitment.

19                There are other reasons why you take CSTP 11  
20       plans and discontinue them. That is to upgrade **term** plans  
21       and other things.

22       **Q** **If Winback** had a plan and none of these transfers had  
23       occurred, who would be liable if there were shortfall  
24       and/or discontinuation penalties **assessed**?

25       **A** My corporation. Winback.

1 Q Once you transferred the plans to CCI, would CCI also  
2 be liable?

3 A Jointly and severally.

4 Q So both Winback and CCI?

5 A Yes.

6 Q Once the traffic is on PSE and end users don't pay  
7 their bills, say, in a given month, who pays **that loss** of  
8 money to **AT&T**?

9 A That is for billing. That would be paid by **PSE**. They  
10 would pay any bad debt charges.

11 That is different than shortfall **or** termination  
12 charges. PSE would be required to do the -- **AT&T** would  
13 take the money out of PSE's check for bad debt after the  
14 plan was transferred.

15 Did I answer the question -- did I **respond**?

16 Q Yes. One or two final questions.

17 With the revenue stream that would be generated  
18 if these transfers go through, will Winback earn more or  
19 less money per month, let's say, or year compared to what  
20 it is earning now, if the transfers didn't occur?

21 A Very simple. Revenue would be greatly increased.  
22 Income to Winback, **as** with the other companies, would be  
23 greatly increased to meet any type of obligations of **AT&T**.  
24 More so than even before.

25 Q How many marketing representatives have you lost in





1 Q Winback & Conserve had the obligation of shortfall and  
2 termination charges with respect to the plans that you  
3 attempted to acquire by the Memorandum of Understanding of  
4 October 12th, D-3 in evidence, correct?

5 A Would you repeat that? I'm not sure I understand your  
6 question.

7 Q I'll can Mr. Rizman to **read** it, If you don't understand  
8 it, rephrase it.

9 (Record read.)

10 A I'm still not sure I understand the question.

11 Q Let me try again.

12 You understood prior to the execution of 0-3, the  
13 Memorandum of Understanding, that Winback & Conserve was the  
14 holder of approximately eight **plans**, correct, CSTP II plans?

15 A Yes.

16 Q Winback & Conserve or one of the other Inga companies,  
17 correct?

18 A **Yes.**

19 Q And you knew, did you not, there **was** shortfall and  
20 termination charges that were potentially associated with those  
21 plans, correct?

22 A Yes. I knew the tariff very well, **yes.**

23 Q You knew very well, did you not, that by signing the  
24 Memorandum of Understanding CCI **was** intending to take on those  
25 shortfall and termination charges, correct?

1 A Yes, sir.

2 Q You knew, also, did you not, that by the assignment of  
3 traffic from Winback & Conserve plans but not the plans to PSE  
4 that the obligation of shortfall and termination stayed with  
'5 Winback & Conserve, isn't that correct?

6 A No. I would **have** viewed it in the context of the analogy  
7 that you used, that it stayed with CCI.

8 Q It would have stayed with CCI or Winback & Conserve or  
9 Conserve or both?

10 A Yes.

11 Q What is clear, is it not, is that PSE did not assume the  
12 obligation of shortfall and termination charges under those  
13 plans, correct?

14 A Absolutely clear.

15 Q PSE did not assume the obligations of either Winback or CCI  
16 for shortfall and terminations?

17 A Absolutely. We did not want them to.

18 Q Mr. Shipp, are you familiar with the language of Tariff  
19 Provision 2.1.8?

20 A Yes.

21 Q That says that the transfer of all **the** obligations of the  
22 former customer, does it not?

23 A Yes. It goes on. Yes.

24 Q It says all the obligations of the customer, correct?

25 A Yes.



1           There we put in, "Move all except," then we asterisk  
2       it down there to say "Traffic only. Move all **BTNs**  
3       except" -- we left behind the lead account number.

4           If we were moving all of the traffic there, your  
5       Honor, we would have said: Move all associated with CS-PSE  
6       plan XYZ number which would, therefore, **take** the entire plan  
7       along.

8           This form we **use** literally and figuratively every **day**.

9       Q   You **used** it for **two purposes**, isn't that correct, Mr.  
10       Shipp?

11       A   **Yes.**

12       Q   One is to transfer customer --

13           MR. WHITMER: Your Honor, may I object?

14           THE COURT: You're testifying again,

15           MR. YESKOO: Okay.

16       Q   When you are moving transfer accounts, how do you fill out  
17       this form? Accounts only?

18       A   Just as noted herein in this Exhibit P-3.

19       Q   Could **you** explain the difference between a lead account and  
20       an end user account?

21       A   They have different benefits and responsibilities. The 131  
22       or 181 account, which is the end user location account -- is  
23       that account assigned to the individual location that allows  
24       AT&T to bill that location for its usage, collect the charges  
25       under that account number and service that account.

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1           The 181 number and **lead** account number **are** set up by  
2 **AT&T** to be able to remit **back** to the customer of record any  
3 moneys that might be accrued on **behalf** of the plan holder or to  
4 charge shortfall penalties or liabilities associated with the  
5 plan to that plan to that account number.

6           I would say 'designated in discrete number set up with  
7 each individual plan.

8       Q     When you transfer an end user account, do you transfer  
9 shortfall and termination responsibilities?

10      A     NO. In fact, in the January 31st transmittal you will see  
11 in the bottom paragraph it **says** "**This** order is solely to **move**  
12 the locations associated with these **plans** and not intended in  
13 any way to discontinue the plans."

14           The reason why that was there was because we didn't  
15 **want** to invoke the shortfall penalty, having the plan collapse,  
16 without our ability to meet the annual commitments. So we  
17 didn't want to prematurely cancel. It had to survive.

18      Q     Approximately how many times have you **used** this form to  
19 transfer end **user** accounts **as** opposed to plans prior to this  
20 transaction?

21      A     Hundreds.

22      Q     Had AT&T ever come to you and said, by the way, Mr. Shipp,  
23 we want you to know you're also transferring the shortfall and  
24 termination liabilities with the **lead** account when **you** transfer  
25 an end user account?

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1 A Never.

2 MK. YESKOO: No further questions, your Honor. Thank  
3 you.

4 MR. WHITMER: I have no questions, your Honor.

5 BY THE COURT:

6 Q Mr. Shipp --

7 A Yes, sir.

8 Q -- please look at P-3 --

9 A P-3?

10 Q -- which is the January 31st, 1994 letter,

11 A Yes, sir.

12 Q Take any one of the attachments. Take the first  
13 attachment. Okay?

14 A Okay.

15 Q Let's you and I go through it for a moment, if we might.

16 A Okay. I have it.

17 Q The first transfer form.

18 A I have it.

19 Q It says "I, Winback and Conserve Program, Inc. Plan  
20 No. 1351" -- do you have that?

21 A Yes, sir. I do. I'm looking at it.

22 Q -- "Hereby Request That AT&T transfer or assign services  
23 for Account Numbers..."

24 You say "None."

25 A "Move all" --



1 MR. WHITMER: Public Service Enterprises was a  
2 plaintiff in this case. And it is the entity to which the  
3 transfer for the mandatory injunction that is being sought  
4 here on a preliminary basis is being -- is identified as.

5 In other words, Public Service Enterprises is a  
6 company to whom this traffic would go if the plaintiffs  
7 had their way. We sued them -- AT&T sued them in the  
8 Eastern District of Pennsylvania, where they are located,  
9 for a shortfall on existing servicing arrangements when  
10 the shortfall, as calculated by AT&T to be and the demand  
11 in the Complaint is \$79,574,221.28. That is a real number  
12 with respect to real service with respect to arrangements  
13 that Public Service had agreed to with AT&T in other  
14 matters. That is the entity to which CCI seeks to have  
15 the traffic transferred now without the benefit of the  
16 plans in the shortfall.

17 Your Honor, I think several things need to be  
18 said. I think it can be said **very** briefly.

19 The issue of primary jurisdiction is one that  
20 your Honor, I think, has decided correctly. There is no  
21 reason to change that decision. The FCC is, in fact, the  
22 appropriate place to decide the issue. The FCC can decide  
23 whether AT&T's practice was unreasonable or or not  
24 reasonable under the Federal Communications Act.

25 If the plaintiffs in this case were so interested

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1 in expediting the procedure in the FCC, they had the right  
2 and, indeed, I think, the direction of this Court. They  
3 could have filed a Complaint in the FCC pursuant to this  
4 **Court's** primary jurisdiction decision to say what AT&T had  
5 done was an unreasonable practice under the Act and it  
6 constituted unreasonable and unjust discrimination.

7 **THE COURT:** But you have to admit, do you not,  
8 that I was very clear in noting **that you** had before the  
9 FCC an existing application dealing with the very issues.  
10 To say they could have or should have or would have really  
11 doesn't, in my judgment, solve anything.

12 **MR. WHITMER:** I think it **does**, your Honor. I  
13 think it does. Let me respond to what the Court has said.

14 The issue when we were before you in -- was it  
15 March of 1995?

16 **THE COURT:** **Probably.**

17 **MR. WHITMER:** The issue that we had put before  
18 the Commission with respect to **the** tariff transmittal was,  
19 in **fact, squarely** the issue that they were raising here.  
20 When this Court decided that the FCC was a better place **in**  
21 which to adjudicate, and I think properly so, because this  
22 is not a simple matter of deciding what the tariff  
23 language means. It **really** is a decision which implicates  
24 broader Federal Communications Act policy at the  
25 Communications Commission, which is the repository of the



1 an appropriate practice that AT&T had undertaken and  
2 whether it was appropriate under the tariff, that that was  
3 a decision which reflected the Court's judgment with  
4 respect to the implementation of the Federal  
5 Communications Act policy. That I think **was** correct.

6 Instead of bringing **this** reconsideration motion,  
7 which I think doesn't accomplishes anything, if the  
8 plaintiffs had gone to the Federal Communications  
9 Commission and filed -- Mr. Helein is a practitioner there  
10 on a regular basis. I'm not giving him the revealed  
11 wisdom that I turned up on **gold** tablets that I found on  
12 the side of a mountain in Utah, your Honor. I'm talking  
13 about something well-known to a practitioner.

14 If he filed the **Complaint**, either informal or  
15 formal Complaint, with the Commission in July to tee up  
16 this issue precisely as he wanted it teed up in the forum  
17 this Court had concluded was the appropriate forum in  
18 which it would be decided, they would be much further **down**  
19 the road than they claim to be today.

20 So that from the threshold of this argument;  
21 namely, whether or not primary jurisdiction should be  
22 here, the answer is it **should** not. It should, in fact, be  
23 the FCC that decides this issue. If, in fact, it is this  
24 Court's --

25  THE COURT: Tell me about what happened at the

1 FCC.

2 MR. WHITMER: I think Mr. Meanor's affidavits  
3 have told you that in some respects. I will give it to  
4 you in --

5 THE COURT: *Why* was it necessary and -- why was  
6 it necessary to take the rather simple, uncomplicated  
7 issue that was involved in both this case and in the  
8 filing with the FCC, withdraw it after it had been there a  
9 couple of months, and replace it with 62 or 72 or 82 pages  
10 of -- give that to me -- where -- I would like to know  
11 where it is in that submission. In what page of that  
12 submission is this issue dealt with and why?

13 That is my problem. I'll be perfectly honest  
14 with you.

15 MR. WHITMER: Let me respond to that this way,  
16 your Honor.

17 THE COURT: Here it is. It's an inch thick.

18 MR. WHITMER: Yes, it is.

19 THE COURT: The other one was one page.

20 MR. WHITMER: Your Honor, let's deal with it in  
21 two ways.

22 The first way is that the Federal Communications  
23 Commission has as its charter a very much broader command  
24 in terms of determining and directing Federal  
25 Communications Act policy.




1 THE COURT: Absolutely right.

2 MR. WHITMER: **And** although I'm not a  
3 Communications Act practitioner in the Communications  
4 Commission and I do not purport -- I do not purport to  
5 tell *you* from **personal** experience **what** happens in the  
6 Commission. I do **know** that the **processes** in the  
7 Commission in terms of tariff dealings are less formal  
8 than they are adjudicatory -- than the adjudicatory  
9 processes are.

10 I'm sure this is not **the** first time in the  
11 history of AT&T's submission to the Commission that  
12 something has been submitted to the Commission seeking to  
13 solve Problem X and the Commission looks at it and says:  
14 Well, yes, **but** you've got Problem Y **and** Problem Z or that:  
15 the solution to **Problem X creates problems A, B and C, so**  
16 **on.**

17 You have an evolutionary process.

18 Now --

19  THE COURT: This **was** not an evolution. This was  
20 an explosion. I mean, "**evolved**" means **like** one to three,  
21 three to seven. **This** is from a one-page submission to 60  
22 some-odd pages.

23 I would appreciate your telling me on which one  
24 of **these** pages, which I think are unnumbered, the issue  
25 that is involved in this **case is.**

1 MR. WHITMER: I think I've given you the answer  
2 to that already.

3 THE COURT: Where **is** it?

4 MR. WHITMER: That **is** the **way** -- the direction  
5 that AT&T --

6 THE COURT: No. I want an answer to that  
7 specific question.

8 MR. WHITMER: I've answered that question.

9 THE COURT: If you answered it, I haven't heard  
10 the answer or I don't understand the answer. Okay. Where  
11 was it in here?

12 MR. WHITMER: Your Honor, there is not a single  
13 page in that submission that cues up precisely the issue  
14 that is here. That we've **said**. I say it now. I'm not  
15 ducking the **question**.

16 THE COURT: What was the **other submission**? Let's  
17 talk about the other submission. Get me the other  
18 submission.

19 MR. WHITMER: The other submission directed  
20 itself specifically to this **case**.

21 THE COURT: Yes.

22 MR. WHITMER: The Commission, in **discussions** with  
23 AT&T, broadened the issue. **AT&T** took the tack -- took the  
24 tack to try to **address** the question differently.

25 But let me **respond** to a broader question of the

1 Court. A broader concern.

2 If the Commission, your Honor -- if the  
3 Commission --

4 THE COURT: ~~Are you~~ telling me the Commission  
5 couldn't answer that question? Is that what you're saying  
6 to me, the Commission could not answer that question?

7 MR. WHITMER: No, your Honor. Of course not.

8 THE COURT: What are you saying? The question  
9 was there. I mean, if somebody brings a question before  
10 me -- put aside for the moment that I am a judge, because  
11 I'm perhaps more formal than the FCC.

12 MR. WHITMER: That is a big "perhaps," your  
13 Honor. That is a very big "perhaps."

14 THE COURT: But if you come into chambers and I  
15 don't have my robe on and you give me Issue A, I don't  
16 tell you to give me the invention of the time machine. I  
17 say I want to talk about Issue A.

18 You very well knew -- your client very well  
19 knew -- let me just finish. Everybody very well knew  
20 where I was coming from in my opinion of May 19th about  
21 primary jurisdiction.

22 There is no question in my mind, at least, to the  
23 English that I used, where I was coming from.

24 I suspect most people, given a fair reading to  
25 this very short document that I produced here, some 25



1 pages of opinion, knew what it **was** all about because there  
2 **was** only **one** section of it, **about** two or three **pages**, that  
3 dealt with primary jurisdiction.

4 I felt **very** comfortable with the fact that, A,  
5 your client had submitted the issue to the FCC, that the  
6 FCC **was** going to **apply** its expertise to the issue **and** that  
7 whatever that resolution waa would come **back** to me and  
8 then **we'd** determine what to mold, if anything, here.

9 MR. WHITMER: **That** is still true, your Honor.

10 THE COURT: **When** will *it* happen?

11 MR. WHITMER: That is still true. ' ' ' ' If the tariff  
12 submission that is before you which **you** described as the  
13 explosion is, in fact, put into place, your Honor, that  
14 will -- by its being permitted to go into effect, in  
15 effect, your Honor is **saying** that AT&T's position with  
16 respect to the transfer, **that** we refuse to give here, was  
17 also correct.

18 **Why** is that?

19 THE COURT: **Why** is that?

20 MR. WHITMER: **Why** is that?

21 THE COURT: **Why** is that?

22 MR. WHITMER: It's easier for me to **ask** the  
23 question **and** then answer it.

24 THE COURT: You ask the question and **answer** it.

25 MR. WHITMER: I **know** that **is** the question the



1/23/96

16

1 MR. WHITMER: I'll let **you** talk to my first wife  
2 and ask if it is necessary to assume that obligation if I  
3 wore the **robes**.

4 THE COURT: I wouldn't have to do it.

5 MR. WHITMER: This is a discussion that may be  
6 useful to pursue, but not on the record.

7 The answer to why is that -- is what AT&T -- what  
8 AT&T is doing with respect to the broader submission to  
9 the Commission is, in effect, setting **up** a different  
10 tariff set of procedures which will address the question  
11 and problem that these transactions, as **are** put into issue  
12 in this case, have raised.

13 If the Commission permits AT&T to go forward with  
14 this tariff submission, as I think they will, that in'and  
15 of itself means that the practices that are set forth in  
16 the expanded -- in the expanded submission are reasonable  
17 practices or lawful practices, as the Commission has  
18 worked with them and has permitted them to go into effect.

19 That means, your Honor -- I think by analogy  
20 perhaps more **so** than than absolutely as a matter of law --  
21 but I think the Court can take from that reaction of the  
22 Communication Commission to the new submission that **AT&T**  
23 **was** appropriate -- **was** acting appropriately under the  
24 Communications Act when it refused to recognize the  
25 fractionalized transfer.

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1 That is the reason why --

2 THE COURT: They don't want to answer -- that  
3 submission will not answer it retrospectively, but merely  
4 prospectively.

5 MR. WHITMER: Your Honor, let me do it a  
6 different way.

7 THE COURT: Sure.

8 MR. WHITMER: The Act hasn't changed.

9 THE COURT: Which Act?

10 MR. WHITMER: The Federal Communications Act.

11 THE COURT: You refer to this act that goes on  
12 once a month in front of me?

13 MR. WHITMER: It has been a long time since it  
14 has gone on,

15 THE COURT: Only because it was on the road for a  
16 little while in Pennsylvania.

17 MR. WHITMER: I enjoyed Philadelphia, your Honor.  
18 I especially enjoyed the result.

19 THE COURT: I understand you had a very major  
20 victory. Very good.

21 Was it in a case similar --

22 MR. WHITMER: Justice triumphs, your Honor.

23 THE COURT: Justice triumphs regardless of who  
24 wins.

25 MR. WHITMER: Correct.



1 THE COURT: That doesn't **add** anything to the  
2 luster.


3 MR. WHITMER: That is correct.

4 THE COURT: Victory is the victor.

5 MR. WHITMER: They said **AT&T** monopolized,  
6 restrained trade, engaged in unreasonable practices and **a**  
7 variety of such similar **claims**. And the jury returned a  
8 verdict in **AT&T's** favor in **all** respects and returned a  
9 verdict on the counterclaim of \$660,000 for services  
10 rendered but not paid for.

11 That **was** the verdict after three hours of  
12 deliberation following **a** three-month trial.

13 THE COURT: **Very good.**

14  MR. WHITMER: Your Honor, what will -- what has  
15 resulted in what is before you is .. what you called the  
16 "exploded tariff submission" is, in fact, a document which  
17 does not on its face and pursuant to its own terms  
18 adjudicate the controversy between **AT&T** and these  
19 plaintiffs. That's true. But that's really not  
20 important. It's not.

21 THE COURT: It is not important to who?

22 MR. WHITMER: It is not important to you. It **is**  
23 not important to me. It is not important to these  
24 plaintiffs. It is not important because the fact that the  
25 Commission would permit **AT&T** to put into place the tariff

1 submission which you have in your hands now would, by the  
2 act of doing that, mean that AT&T was appropriate and  
3 proper in dealing with the problem. That would mean that  
4 it would not have been an unreasonable practice. It was  
5 not an unreasonable practice.

6 THE COURT: That I got to do by inference after  
7 they agreed to permit you to put into focus this 60-page  
8 thing.

9 I always thought primary jurisdiction -- excuse  
10 me for saying so. I always thought primary jurisdiction  
11 meant if there was a matter that had to be adjudicated,  
12 adjudicated, adjudicated before a court, that if there was  
13 another body which was charged with expertise in that  
14 area, that it was appropriate to cede the power of this  
15 Court to that tribunal to get their expertise on the issue  
16 which had to be adjudicated.

17 MR. WHITMER: Your Honor --

18 THE COURT: Wait a minute.

19 - MR. WHITMER: You'll get that.

20 THE COURT: You say I'll get that. I'm not sure  
21 I'm going to get anything. I don't know what you're going  
22 to do here.

23 Let me ask you this question. Where is this  
24 thing now? (Referring to brief.) What phase of the  
25 proceeding?



1 submission which you have in your hands now would, by the  
2 act of doing that, mean that AT&T was appropriate and  
3 proper in dealing with the problem. That **would** mean that  
4 it would not have been an unreasonable **practice**. It was  
5 not an unreasonable practice.

6 THE COURT: That I got to do by inference after  
'7 they agreed to permit **you** to put into focus this 60-page  
8 thing.

9 I always thought **primary** jurisdiction -- excuse  
10 me for saying so. I always thought **primary** jurisdiction  
11 meant if there was a matter **that** had to be adjudicated,  
12 adjudicated, adjudicated before a court, that if there was  
13 another body which was charged with expertise in that  
14 area, that it was appropriate to cede the power of this  
15 Court to that tribunal to get their expertise on the issue  
16 which had to be adjudicated.

17 MR. WHITMER: Your Honor --

18 THE COURT: Wait a minute.

19 - MR. WHITMER: You'll get that.

20 THE COURT: You say I'll get that. I'm not Sure  
21 I'm going to get anything. I don't know what you're going  
22 to do here.

23 Let me ask you this question. Where is this  
24 thing now? (Referring to brief.) What phase of the  
25 proceeding?

1 MR. WHITMER: It is pending, as I understand.

2 THE COURT: Pending. I have 324 cases pending  
3 here. Some are ripe and will be determined **very** promptly,  
4 like the jury trial I'm doing today. Others may not be  
5 reached for another year and a half for two years. Where  
6 does this end?

7 I recognize you have been tabbed as the expert in  
8 this area. We'll get to you. (Remark addressed to Mr.  
9 Helein.)

10 MR. WHITMER: The answer to your question I don't  
11 think can be given **with** the kind of precision that you  
12 want.

13 THE COURT: Can you give me something with the  
14 precision of an action **as** distinguished from a scalpel?

15 You like that, don't you?.

16 MR. WHITMER: I do like that, your Honor.

17 THE COURT: Write it **down** so you use **it** the next  
18 time you have to argue.

19 MR. WHITMER: I'll have to remember **it** was you  
20 who said it **so** I can either quote you --

21 THE COURT: You can steal from me **all** you want.  
22 Everything but my wife you can have.

23 MR. WHITMER: Actually, I learned from **an** expert  
24 witness of mine many years **ago** that precision sometimes  
25 only mimics accuracy. So that being precise about

1 something is not necessarily being accurate. I **can't**: be  
2 **precise**. I'm going to try to be accurate.

3 **The** Commission does not have a rigid timetable  
4 with respect to deciding **such** things, to be fair about  
5 this.

6 On the other hand -- and I **come back** to something  
7 ' **I've** said earlier. **On** the other hand, if these plaintiffs  
8 filed a Complaint in the Commission to **tee up** this issue  
9 under the **doctrine** of **primary jurisdiction**, as **the** Court  
10 **ruled** earlier, that sets in motion time periods to permit  
11 the issue to **come** to a head in the Commission. This  
12 Court -- this Court ruled sensibly.

13 **THE COURT:** In other words, if they tee it **up**  
14 tomorrow morning, when will they get an adjudication?

15 **MR. WHITMER:** I don't **know**, your Honor. That is  
16 a very honest **answer**. I don't know.

17 **THE COURT:** We lost about -- **since** May, let's  
18 say -- since March or April or **May**, we lost almost a year.

19 **MR. WHITMER:** But, your Honor, forgive me for  
20 saying this. That is really not my fault. It is not my  
21 fault **for** two **reasons**. Because the **day after** you  
22 **decided** -- was it **May 19**?

23 **THE COURT:** **May 19** was the opinion **date**.

24 **MR. WHITMER:** I don't know what day **of** the **week**  
25 that was. But -- **whatever** day.



1 incomplete record, an interlocutory record.

2 Since May 19th, 1995, your Honor, and even before  
3 that. We've taken no discovery. We've taken no steps to  
4 advance this case because, frankly, I expected the FCC's  
5 decision on the tariff submission that came out to be  
6 beneficial to this Court in giving direction.

7 There is one thing I forget to say earlier which  
8 I may have said by indirection. I will say it more  
9 directly. That is the Court previously suggested that in  
10 primary jurisdiction you would refer the question to be  
11 referred -- can you do X and the expert agency comes back  
12 and says yes or no.

13 That is not the only purpose of primary  
14 jurisdiction. Because in addition to decision, I think  
15 guidance is another reason for primary jurisdiction.

16 The Commission's resolution of the tariff  
17 submissions that AT&T has made, including the one that is  
18 before your Honor in what you call the exploded version,  
19 the number of which for some reason I can't keep in my  
20 head, but that tariff submission, your Honor, once it goes  
21 into effect, even if it doesn't as a matter of law have  
22 retrospective application. And even if it doesn't as a  
23 matter of law decide this case and even if it, as a matter  
24 of law, doesn't require you to make a finding in a certain  
25 way in this case, it will, as a matter of law and as a

1 matter of common sense and as a matter of legal logic,  
2 give you guidance.

3 THE COURT: What guidance **would** it give me?

4 MR. WHITMER: Well, **if** the Commission permits the  
5 tariff submission to go into **effect** --

6 THE COURT: This one?

7 MR. WHITMER: Yes, sir.

8 THE COURT: The fat one.

9 MR. WHITMER: That will tell you, I think -- that  
10 will tell **you** that AT&T can appropriately forbid people  
15 from fractionalizing their **service**.

12 We used that term before. That you can't  
13 separate the **plan** from the **service**.

14 THE COURT: Where in here would that say that?

15 MR. WHITMER: Well, your Honor --

16 THE COURT: Where?

17 I'm **just** a poor country judge, **okay**? I don't go  
18 to Washington. I don't go to the FCC. But **I've been**  
19 trained to read and write the English language **and** no  
20 other. **You're** saying --

21 MR. WHITMER: I doubt that.

22 THE COURT: The FCC permits this to go into  
23 existence. This is going to give me guidance. Well, my  
24 only question is: Whence in this **Bible** is the guidance?

25 That is all I want to **know**. Where is it?

1 MR. WHITMER: If you look in Mr. Meade's second  
2 supplemental affidavit, your Ronor, I think he **gives** you  
3 direction.

4 THE COURT: Gives me a direction.

5 Let's get Mr. Meade's supplemental certification.

6 MR. WHITMER: The second --

7 THE COURT: The second supplemental  
8 certification. Give me that. Do I have it here?

9 MR. WHITMER: I have it.

10 THE COURT: Mr. Meade's certification dated -- I  
11 think I have it -- March 6th, or is there one after that?

12 MR. WHITMER: It is November 28, 1995.

13 THE COURT: November 28. We'll get that. Be  
14 patient with us.

15 MR. WHITMER: Specifically.

16 THE COURT: Let me get it first.

17 MR. WHITMER: I have it here. You can have my  
18 copy.

19 THE COURT: This is the fat supplemental.

20 Could I borrow a copy of yours and it will make  
21 it faster?

22 MR. WHITMER: I'll hand it up to your Honor.

23 THE COURT: Sure.

24 (Document handed to the Court.)

25 MR. WHITMER: If you look at paragraph 15 --

1 THE COURT: Paragraph 15.

2 MR. WHITMER: You can look at everything,  
3 obviously.

4 THE COURT: You say look at paragraph 15.

5 "On October 26, 1995, AT&T Corp. filed Tariff  
6 Transmittal No. 9229 with the FCC. Transmittal No. 9229  
7 addresses the problem implicated in the CCI-PSE  
8 transfer --- the segregation of assets (locations) from  
9 liabilities (plan commitments) --- in the following  
10 manner. (Relevant pages of Transmittal 9229 are attached  
11 hereto as Exhibit E.) Section 2.5.8.B (Shortfall Deposits)  
12 gives AT&T the right to demand a deposit to cover  
13 shortfall charges in the event: a) the term commitment is  
14 greater than one year; b) the customer is asked to remove  
15 locations (by transfer or otherwise) such that the  
16 remaining locations would generate charges less than 80  
17 percent of the revenue commitment; and c) the customer's  
18 net assets are insufficient to secure against the risk of  
19 shortfall or the customer's financial responsibility is  
20 not a matter of record. Section 2.1.8 (Transfer of  
21 Service) of Transmittal No. 9229 specifies that AT&T has  
22 the right to reject the requested transfer if either party  
23 fails to pay a required deposit."

24 That's it.

25 MR. WHITMER: Yes, sir. Irrespective whether



1           that **is** prospective -- may I have it back?

2           THE COURT:   Sure.

3           (Document handed to Mr. Whitmer.)

4           THE COURT': We've got it, also. In fact, we even  
5           had it marked in pen. Just to show you all the tricks of  
6           the Court.

7           All right. Be that as it may, let me hear from  
8           Mr. Helein for a minute about all of this.

9           What is your commentary, Mr. Helein? I've got to  
10          get on with a jury trial.

11          MR. HELEIN: It will be brief, your Honor.

12          THE COURT: I have all the papers. I have masses  
13          of papers,

14          Go ahead.

15          MR. HELEIN: Thank you, your Honor.

16          First of all, I would just simply like to point  
17          out that Mr. Meade made one, probably, truthful statement  
18          in the certification.

19          THE COURT: Let's not start with that, please.  
20          Just say -- I don't want to get into the throwing issue.  
21          If I want to have dirt, I'll put people on the stand.  
22          I'll charge people who lie -- send them over to the U.S.  
23          Attorney's office to be prosecuted. We're not in that  
24          stage.

25          MR. HELEIN: Mr. Whitmer said 9229 addresses the

1 issue. He **read** from that. Mr. Meade in the following  
2 paragraph of the second supplemental certification,  
3 paragraph 16, admits the transfer of **9229** will not **apply**  
4 to the Court as referred to the FCC back in May.

5 The fact is that --

6 THE COURT: Then the matter is not before the  
'7 **FCC**.

8 MR. HELEIN: No, it is not, by Mr. Meade's own  
9 certification.

10 THE COURT: **Why** shouldn't you bring it to the  
11 **FCC**?

12 MR. HELEIN: First of all, your Honor, we have  
13 brought the issue to the **FCC** both in the petitions to  
14 reject 8179, which AT&T withdrew -- that **was** where the  
15 fractionalization issue was addressed specifically.

16 THE COURT: **A** complaint and a counterclaim, if I  
17 might use my vernacular.

18 MR. HELEIN: Because it is important -- Let me  
19 just address it this way. In a tariff process you file **a**  
20 petition to reject or suspend. That is what **they're**  
21 called.

22 The tariff carrier files a response to that.  
23 Then, if the Commission allows the tariff to go into  
24 effect despite the objections, then **you** file the formal  
25 complaint, which is more like what **we** would do here in



1 THE CLERK: Combined Companies versus AT&T Corp.  
2 95-908. Please note your appearances for the record.

3 MR. "OR: H. Curtis Meanor, Podvey, Sachs, et  
4 cetera, and Charles Helein for Winback & Conserve, One Stop  
5 Financial, Group Discounts, et cetera.

6 MR. YESKOO: Richard Yeskoo for Combined Companies.

7 MR. WHITMER: Pitney, Hardin, Kipp & Szuch by  
8 Frederick L. Whitmer for AT&T Corp.

9 With me today and arguing on behalf of AT&T is  
10 Edward R. Barillari of the AT&T Law Department.

11 THE COURT: Mr. Barillari, this is the first time I  
12 heard **you** in these series of cases.

13 MR. BARILLARI: I don't think so, your Honor.

14 THE COURT: I heard you once before, didn't I?

15 MR. BARILLARI: Yes.

16 THE COURT: Good afternoon. Nice to **see** you.

17 MR. BARILLARI: Thank you, Judge.

18 Your Honor, we bring this application because AT&T, if  
19 it is forced to abide by your Honor's order, will be placed in  
20 a financial position from which it may not be able to recover.

21 THE COURT: Let's get to that. Let's get to that.  
22 Let's get right to it.

23 Number one, am I correct that all of the **telephone**  
24 charges that are emanated from this transaction, or created  
25 through this transaction, will be billed directly by AT&T to

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1     **the customer** and the customer will pay AT&T directly? Correct  
2     or incorrect?

3             MR. BARILLARI: That's correct to date, your Honor.

4             THE COURT: Wait a minute. Next question.

5             If AT&T ~~is~~ not paid in a timely fashion, do they have  
6     the right to terminate that service?

7             MR. BARILLARI: They **have the** right to terminate the  
8     service from which the **charges** are emanating?

9             THE COURT: **Yes. So in terms of** granting **service,**  
10     quote, unquote -- in **terms** of granting **service,** they **are** as  
11     protected as they are with **any** other customer they **deal** with,  
12     me, Mr. Rizman or anybody else.

13             MR. BARILLARI: No. Not under the current way things  
14     are going to happen, your Honor. If you will let me explain?

15             THE COURT: Please.

16             MR. BARILLARI: Your Honor, what we have here are two  
17     separate Commitments made by two separate companies. Mr. Inga  
18     **has** made a certain commitments to AT&T under the  
19     customer-specific **term** plans **his** company **has** ordered. **He**  
20     **agreed** to these commitments and he satisfies those commitments  
21     by the volume of calls placed under those **plans.**

22             PSE, on **the other** hand, **has,** likewise, made a  
23     commitment to AT&T under a different plan and **PSE satisfies its**  
24     commitment as the volume associated with their plans are  
25     generated.

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1           **What** we have here, your Honor -- here's the problem.  
2       We have **two** separate commitments in a package of **AT&T calls** or  
3       traffic. **What** plaintiffs are trying to do here is **satisfy** both  
4       commitments simultaneously with the same traffic, and that  
5       **can't** happen. That traffic can be used -- if it is **sent** to  
6       **PSE** -- can be used to satisfy **PSE's** commitment **but it** can't  
7       possibly be used at the same **time** to satisfy Winback &  
8       Conserve's commitments.

9           **THE COURT:** Talking about what they call generally the  
10       shortfall?

11           MR. BARILLARI: **Yes.** Whatever.

12           **THE COURT:** You're not talking about -- see, there are  
13       **two** things you're talking about. **You**, for example -- let me  
14       break it **down** into layman's **language**, if I might. For example,  
15       you have a contract **with** Inga that **he's** going to supply a  
16       certain amount of traffic at a certain price.

17           MR. BARILLARI: That's correct.

18           **THE COURT:** You have an agreement with PSE that they  
19       will supply a certain amount of traffic at a certain price  
20       which is **different** from the **Inga** price.

21           MR. BARILLARI: The prices may be different. Yes.

22           **THE COURT:** Now **you're saying:** **But** if you combine the  
23       two, one or the **other** is not going to meet **its** commitment **in**  
24       terms of volume, is that correct?

25           MR. BARILLARI: They're not going to meet their

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1 commitment. As a result the plan is going to shortfall.

2 THE COURT: You'll have a shortfall.

3 In my opinion in this **case** I suggested to **you** and I  
4 suggested to AT&T that if they were **unhappy** now that the bond  
5 is being posted, you have **every** right to come before me to  
6 present facts and I would hold **a** hearing in that regard to  
7 **increase** the amount of the **bond** if I **was** convinced, in my  
8 discretion, that more bonding **was** necessary to **ensure** that AT&T  
9 would not be **harmed** by my injunction, if it later turned **out** my  
10 injunction was improperly granted **and** I did that.

11 I will tell you I have **made** a finding and I think it  
12 **is in** my opinion that I don't think what: AT&T has produced to  
13 me at this juncture evidence of sufficient clarity for me to  
14 make an intelligent judgment. With all due respect, it is a  
15 bunch of facts thrown against the wall. Whatever sticks,  
16 sticks. Whatever doesn't stick, doesn't stick. I don't mean  
17 that disrespectfully.

18 MR. BARILLARI: I understand.

19 THE COURT: Please, I don't. But what I'm saying to  
20 **you** is, if you would like to, I have no objection to **your**  
21 coming in on a full factual hearing and say we want more **on** the  
22 bond and present testimony, facts, figures, expert testimony,  
23 if you **would**, or such other testimony **you** deem appropriate to  
24 convince me that I should **increase** the amount of the bond.  
25 That is an open door for you at all times. Today, **tomorrow**,

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1 the next day, next week, next month, next year or whenever.  
2 But I'm not going to **change** my opinion on the injunction.

3 I granted the injunction for the reasons that I've  
4 expressed. I'll stand or fall on what I express. You may  
5 disagree **with me**. You have absolutely every right to take an  
6 **appeal** to the Third Circuit. They may or **may not** reverse **me**.  
7 Hopefully, they will not **because** I think I'm right. But on the  
8 **issue** of the **bond** I'm certainly wide open.

9 Let **the** record clearly reflect the doors of this Court  
10 are as open as they can be to let AT&T come back in here and  
11 **create** a record on which I can **make a** judgment as to whether or  
12 **not** an additional bond is necessary to protect AT&T's interest.

13 MR. BARILLARI: Your Honor, my concern would then be  
14 if we made a that application after the transfer was set or  
15 accomplished and your Honor decided -- assuming you decided  
16 that our application for a security deposit in the neighborhood  
17 of 10 to 15 million dollars as the shortfall that may become  
18 due and owing would result -- at that point in time it would be  
19 **difficult** for us -- if plaintiffs were unable to post that  
20 considerable bond, **we'd be put in** the position of having to go  
21 back and retrahsfer those **customers** back to AT&T, I would  
22 **assume**.

23 THE COURT: I deal with the facts. I deal with the  
24 facts as they come back. The facts are dynamic. They change  
25 from time to time.

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1 MR. BARILLARI: Our customers on long distance  
2 service, your Honor. That is my concern.

3 THE COURT: At one time you didn't have a concern  
4 because AT&T was -- it wasn't all this problem. Now with Judge  
'5 Greene's decision, **we've got** the spawning of great litigation.

6 MR. BARILLARI: I understand that, your Honor. **We**  
7 have to take our **facts** as we **find** them. My concern is two  
8 weeks from now, a month from now, if your Honor did grant a  
9 larger security **deposit** and they **were** unable to post that  
30 security deposit, we might not be able to undue or unscramble  
11 the **egg**, if you will, at that point.

12 THE COURT: That is quoting from my opinion in Megan's  
13 Law. It is like when they gratuitously cited AT&T versus  
14 Winback, the Third Circuit case.

15 Let me see Mr. Whitmer's face on **this** one. They cited  
16 to me the Third Circuit's decision in AT&T versus Winback.

17 MR. MEANOR: In Megan's law?

18 THE COURT: No. The last case that was here. .

19 MR. WHITMER: It is the prevailing law, your Honor.

20 THE COURT: As I'm sorely reminded by you, Mr.  
21 Whitmer.

22 Very good. You're one up today. Score one for  
23 Whitmer

24 MR. MEANOR: A score but opaque, I would say.

25 MR. BARILLARI: Things are panning out. These things

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1 would hit shortfall soon.

2 THE COURT: Get in to see me soon. I'll schedule a  
3 hearing at your convenience. My doors are open. When you  
4 marshal the facts and get the **facts** together and get the  
5 experts together and get the testimony together, I'll be happy  
6 to hear you.

7 MR. BARILLARI: Your Honor, might I request that  
8 **pending** our scheduling of that hearing that we be granted a  
9 48-hour stay to file an appeal.

10 THE COURT: No. You can file an appeal **tomorrow**. You  
11 can go to a court tomorrow morning. YOU can go see a single  
12 judge, I guess. They may or may not grant it. **I've** had this  
33 case for a long time.

14 MR. BARILLARI: I understand that.

15 THE COURT: I put a considerable amount of work and  
16 effort in and given it my best discussion.

17 MR. BARILLARI: No doubt.

18 THE COURT: Your client was wrong. You have the right  
19 to do it. I'll not backtrack on what I've done. Part of my  
20 decision dealt with the fact that I said in there whatever I  
21 said; about the fact that there was a delay of some seven or  
22 **eight** months or nine months before the Federal Communications  
23 Commission as a result of actions which I felt were -- whatever  
24 I said in the opinion -- dilatory.

25 You may disagree with me on that.

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1 MR. BARILLARI: It is sometimes difficult working **with**  
2 the FCC in getting things done on a timely basis. I don't  
3 think it **was** done purposely.

4 THE COURT: I don't think the opinion even says  
5 "purposely." **Does** it?

6 MR. BARILLARI: I don't believe so.

7 THE COURT: It doesn't go that far. I would never do  
8 that. But what I'm saying is there was an inordinate delay of  
9 the process of **that** which **was** a rather simple issue before the  
10 FCC. I made a reference to that **very** specifically in the  
11 opinion. I hope whoever **sees** this **ease** on appeal will read my  
12 decision, as they always do.

23 MR. BARILLARI: Then do we have a stay at least until  
14 tomorrow morning to file?

15 THE COURT: What will happen between today and  
16 tomorrow morning?

17 MR. BARILLARI: I don't know.

18 THE COURT: Will something happen today, Mr. Helein?

19 MR. MEANOR: **No**, your Honor. I wish you would **sign**  
20 our injunction bonds, the orders approving them.

21 THE COURT: Where are they? What is the objection to  
22 them?

23 MR. WHITMER: There **is** none.

24 THE COURT: I'd be happy to **sign** the injunction bonds  
25 right now.

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1 a \$100,000 **bond**. I have that in escrow in Nat West in an  
2 interest-bearing account with Jeffrey Schwartz.

3' **THE COURT:** He agreed to that. I'll sign the two  
4 orders.

5 **MR. MEANOR:** We want'to substitute a bond for the  
6 first one.

7 **THE COURT:** I'll sign them **now**.

8 **MR. MEANOR:** So I can **take** the **money** out of the bank  
9 and give it tu Mr. Inga.


10 **THE COURT:** So you **can** get paid.

11 **MR. WHITMER:** I have no objection to the substitution  
12 of the **one** for the deposit.

13 **THE COURT:** Actually, **it** is in your hands, to transfer  
14 these things. They can't transfer them. They can give you  
15 notice. You have to implement it.

16 **MR. WHITMER:** That's correct.

17 **THE COURT:** I'll **give** you until tomorrow to see a  
18 judge. If you can get the judge to stop the injunction, **so be**  
19 **it**.

20  **MR. BARILLARI:** Your Honor, one technicality so we're  
21 **clear**. It **is** in our power to make the transfer. SO the Court  
22 understands, we may need certain information **from** Mr. Shipp or  
23 Mr. Inga to make **sure** that happens properly.

24 **THE COURT:** I'm sure you'll do what is appropriate.  
25 What I'm saying to you is the plaintiffs or the defendants --

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1     the plaintiffs are not doing anything to change the status quo  
2     It is up to you to implement it. I guess technically you're  
3     correct in asking for a stay so they don't seek to hold you in  
4     contempt of my order which I understand. As I said, you got  
5     until tomorrow. I've signed the orders.

6             MR. MEANOR: Mr. Inga and Mr. Shipp are both in court.  
7     If you can give us a witness room to get the information they  
8     need right now --

9             THE COURT: I'll be happy to put you in the jury room,  
10    if you need it.

11            MR. WHITMER: Your Honor, Barillari and Whitmer are  
12    nut the people to be getting information as to how to transfer.

13            THE COURT: Why don't you work it out?

14            We deal with laws. Not transfer.

15            THE COURT: Tell them who to transfer to get the  
16    information, which you should. You fellows should settle the  
17    case.

18            MR. WHITMER: Your Honor, that effort -- the door is  
19    open to that effort any time as long as reason prevails.

20            THE COURT: Reason is in the mind of the beholder and  
21    the perception of the sender.

22            MR. WHITMER: Reason is objective, your Konor.  
23    Perspective can sometimes be unreasonable.

24            THE COURT: Nice seeing you, Fred.

25            MR. MEANOR: If AT&T would discuss issuing a contract

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